

(1971), and, in particular, the record that reveals “the grounds that the agency invoked when it took the action,” *End Citizens United PAC v. FEC*, 69 F.4th 916, 921 (D.C. Cir. 2023) (quoting *Dep’t of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020)).

In this case, it appears the FEC has attempted to withhold materials gathered during a rare investigation into a dark money organization: records that not only reveal its dismissal of this matter was contrary to law, but also would likely expose brazen legal violations occurring inside a dark money organization that the FEC has to-date given a free pass. Only after this Court ordered the FEC to respond—more than a year after its appearance was due and after CREW served on it requests for production—has the FEC produced any materials. Yet the FEC continues to withhold relevant documents including those reflecting the “grounds that the agency invoked when it [dismissed] the action.” *End Citizens United PAC*, 69 F.4th at 921.

The FEC has offered no explanation for its failure to respond to CREW’s requests for production. It has offered no justification for its decision to wait more than a year to produce even part of the administrative record. And it has failed to offer any reason why it is not obligated to produce the whole record in this matter and documents responsive to CREW’s requests for production. Accordingly, CREW respectfully requests this Court grant its motion to compel so CREW may proceed to expeditiously resolve this matter which has been unjustifiably delayed by the FEC’s obfuscation.

BACKGROUND

Given the length of time this motion has been pending, CREW briefly recounts the background of this matter. CREW brought this action in 2022 after learning the FEC had closed its proceedings involving CREW’s complaint against a dark money operation called Freedom Vote. *See* Compl., ECF No. 1. The FEC had engaged in a rare investigation after the Commission agreed, unanimously, that CREW’s complaint raised a reason to believe Freedom

Vote violated the law. Cert., MUR 7465 (Freedom Vote), July 25, 2019, <https://perma.cc/YW4X-JQTY>. The FEC's limited public disclosures after it closed the file revealed the investigation not only confirmed CREW's allegations, but expanded on them, showing that at least 71% of the group's \$3.4 million expenditures went to federal campaign activity. General Counsel's Brief 1, MUR 7465 (Freedom Vote), Sept. 20, 2021, <https://perma.cc/4AAV-M9MJ>. It also revealed Freedom Vote unlawfully accepted "an Anonymous donation for the reelection of Rob Portman" in the amount of \$500,000. *Id.* at 16. Notwithstanding this conclusive evidence, the FEC returned to form, deadlocked on further proceedings and then, by majority vote, closed the file on CREW's complaint. Cert., MUR 7465 (Freedom Vote), Nov. 9, 2021, <https://perma.cc/74XH-Z4EE>.

The FEC failed to appear in this action, leading the Clerk to enter default against it on March 29, 2022. Default, ECF No. 5. The FEC also failed to produce the administrative record as required by this court's rules. D.D.C. LCvR 7(n)(1). Nonetheless, given CREW's obligation to "establis[h] [its] claim or right to relief by evidence that satisfies the court," Fed. R. Civ. P. 55(d), CREW sought evidence from the FEC that demonstrates its dismissal of CREW's complaint was "contrary to law," 52 U.S.C. § 30109(a)(8)(C). Eventually, CREW served requests for production on the FEC on April 18, 2022, with a response due within 30 days, for "[a]ll documents in the FEC's file, including both public and nonpublic files, for Matter Under Review 7465" and "[a]ll communications within and among the FEC regarding Matter Under Review 7465, including records, recordings, or transcripts of any meetings of the Commission and executive sessions of the Commission." *See* Mot. to Compel Ex. A at 6–7, ECF No. 6-1; *id.* Ex. C, Aff. of Service, ECF No. 6-3; *see also Cmty. for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990) (discovery against agency available where "record is so bare as to

frustrate effective judicial review”). The FEC failed to respond to either the requests for production or to CREW’s counsel’s various entreaties. Accordingly, on June 8, 2022, CREW filed a motion to compel and served it on the FEC via First Class Mail. ECF No. 6. The FEC failed to respond to CREW’s motion, and CREW filed a notice of that failure on July 20, 2022. ECF No. 7.

Approximately eight months after CREW filed its motion to compel, this Court denied the motion without prejudice and asked for briefing on its jurisdiction given the belated publication of a statement of reasons of a subset of commissioners who invoked prosecutorial discretion as a basis to terminate part of this matter. Minute Order, Feb. 8, 2023. Eventually, after the Court was assured of its jurisdiction and its ability to review this matter because the statement was a “post hoc rationalization” that could not preclude review, the Court vacated its order denying the motion to compel and gave the FEC until November 13, 2023 to oppose CREW’s motion. Minute Order, Oct. 30, 2023.

The Court’s order apparently proved the stimulant to rouse the FEC from its slumber. It agreed to produce many of the documents in its administrative record but, inexplicably, it still refused to produce over three-hundred pages of documents it received from Freedom Vote. The FEC’s counsel admitted the documents were relied on by FEC counsel in its reports to the Commission before their votes to close, *see, e.g.*, General Counsel’s Brief 10 n.46, and were not privileged—even suggesting that CREW seek them through FOIA—but stated the FEC would not produce them in this case. Shortly before its opposition to the Motion to Compel was due, the FEC admitted that it had no basis to withhold these documents and agreed they are part of the administrative record.

The documents reveal the FEC uncovered far more evidence of wrongdoing than was summarized in the General Counsel’s Brief. For example, it reveals the “Anonymous donation” was not a single occurrence, but that Freedom Vote accepted other funds contributed to assist Freedom Vote’s electioneering without disclosing the sources of the funds on any public report. *See, e.g.*, Ex. A (AR2074, AR2076, AR2082). Other funds were apparently accepted from corporate donors, including a \$1 million contribution supporting Freedom Vote’s work “in the Senate race” in Ohio. *See* Ex. A (AR1500–01; AR2110 (contribution from entity regulated by Physicians Payment Sunshine Act)). Freedom Vote made a \$1 million independent expenditure around the time of this contribution to influence that election and made a \$500,000 contribution to an Ohio-focused super PAC, Fighting for Ohio Fund. And it also appears Freedom Vote laundered expenditures for another dark money organization, American Action Network (“AAN”), creating and distributing a door hanger supporting John Boehner that was apparently created and approved by AAN. *See* Ex. A (AR1406, AR1988–89, AR1997, AR2032–33). AAN was at that time the subject of FEC proceedings over its excessive campaign spending. Cert., MUR 6589 (AAN), June 24, 2014, <https://perma.cc/68BM-RBX3>. AAN had disclosed a \$150,000 “general support” grant to Freedom Vote around the time of these emails but did not disclose its involvement in these independent expenditures. *See* AAN, 2014 Form 990, Schedule I (May 15, 2015), https://projects.propublica.org/nonprofits/display_990/270730508/2015_06_EO%2F27-0730508_990O_201406. Freedom Vote would eventually report the door hanger and associated campaigning costs as independent expenditures totaling \$174,607. Freedom Vote, July 15 Quarterly Report at 3 (July 15, 2014), <https://perma.cc/XQ7E-PF8A>.

The FEC continues to withhold, however, documents reflecting the discussions of the Commission in considering this matter, including those discussions reflecting the reasons

adopted by the FEC in its decision to vote to close the file on CREW’s case. The FEC asserts all of the materials CREW seeks are protected by the deliberative process privilege and some are protected by attorney-client privilege.

ARGUMENT

A. The FEC’s Failure to Timely Respond or Object Waived Its Defenses and Privileges

“[T]he failure to timely file an objection to a request for production of documents may be deemed a waiver.” *Fonville v. District of Columbia*, 230 F.R.D. 38, 42 (D.D.C. 2005) (collecting cases). CREW served its requests for production on the FEC on April 18, 2022, yet the FEC did not respond to CREW’s requests until November 13, 2023, 574 days later (and even then only to seek an extension to produce documents). Indeed, the FEC only responded to CREW once it became clear that an attempt to evade judicial review through impermissible post-hoc rationalizations failed. *See* Minute Order (D.D.C. Oct. 30, 2023). The FEC’s complete failure to respond within the time provided constitutes a waiver of all objections and privileges it could assert to CREW’s request. *See, e.g., Fonville*, 230 F.R.D. at 42 (defendant “waived all of its objections” to production); *see also Imperati v. Semple*, 2020 WL 4013304, at *1 (D. Conn. July 16, 2020) (inexcusable delay waived “attorney-client privilege, deliberative process privilege, [and] work product protection”); *D.L. v. District of Columbia*, 274 F.R.D. 320, 323 (D.D.C. 2011) (discussing prior imposition of waiver, including of deliberative process privilege, as discovery sanction).

The FEC’s opposition offers no justification for its delayed response—it barely acknowledges it occurred. The FEC does not claim it lacked notice of this lawsuit or CREW’s requests or that some event beyond its control excused its delayed response. While it discusses the FECA’s bar on publication, *see* FEC Opp. 2 (*citing* 52 U.S.C. § 30109(a)(12); 11 C.F.R.

§111.20), it admits those provisions cease when the Commission “terminates its proceedings,” *id.* (citing 11 C.F.R. § 111.20), as happened here on November 9, 2021 when the Commission voted to close the file on this matter. Cert., MUR 7465 (Freedom Vote), Nov. 9, 2021. The FEC also notes that it did not receive the approval of four commissioners to “authorize defense of this case.” FEC Opp. 6 (citing 52 U.S.C. §§ 30106(c), 30107(a)(6)). That the FEC must obtain four votes to “defend ... any civil action under section 30109(a)(8),” 52 U.S.C. § 30107(a)(6), has no bearing on whether it may respond to requests for production, and the FEC provides nothing to connect the two choices. Nevertheless, that the FEC affirmatively chose to default hardly constitutes an excuse.

The FEC’s failure to offer any timely objection to CREW’s requests, even if it did not otherwise seek to defend this action, constitutes a waiver of all of its objections and privileges.

B. The FEC Failed to Establish Deliberative Process Privilege Applies to The Documents Responsive to CREW’s Requests

Putting aside the untimeliness of the FEC’s response, it still fails to adequately establish a claim to deliberative process privilege that it asserts “[p]revents [d]isclosure of the [d]ocuments CREW [s]eeks” in its requests for production. FEC Opp. 13. “To assert the deliberative process privilege, a party must submit: (1) a formal claim of privilege by the head of the relevant department; (2) based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege was claimed and why it properly falls within the scope of the privilege.” *Landry v. FDIC*, 204 F.3d 1125, 1135 (D.C. Cir. 2000) (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984)). Accordingly, “[t]o avoid waiving the privilege, the defendant agency must ‘make a detailed argument, including affidavits from the proper governmental authorities, in support of the privilege.’” *Doe v. District of Columbia*, 230 F.R.D. 47, 51 (D.D.C. 2005).

The FEC has fulfilled none of its obligations to establish the documents CREW seeks through its requests for production are covered by the deliberative process privilege. It submits no affidavits nor claims to have reviewed any of the materials it asserts are privileged. Indeed, it refuses to acknowledge whether any responsive documents exist. Rather, it speaks only in hypotheticals: arguing “[a]ny documents meeting [CREW’s] descriptions” are protected. FEC Opp. 13. That is plainly insufficient to meet its obligation here, and the FEC has accordingly waived any claim to such privilege. *Doe*, 230 F.R.D. at 51; *Brown v. District of Columbia*, 2021 WL 1439741, at *5-6 (D.D.C. Apr. 16, 2021) (defendant cannot evade obligations to establish deliberative process privilege through simple claim documents are “both pre-decisional and deliberative and therefore inherently protected by the deliberative process privilege” (internal quotation marks omitted)); *Cobell v. Norton*, 213 F.R.D. 1, 8 (D.D.C. 2003) (“Failure to submit an affidavit that conforms with these requirements on the date that defendants file an opposition brief will be deemed to constitute a waiver of defendants’ objection to production of the document on the basis of deliberative process privilege.”).

C. Materials CREW Seeks Include Those Adopted By the FEC That Are No Longer Covered by the Deliberative Process Privilege

The FEC objects to producing the documents CREW seeks that were indisputably “before the [FEC] at the time its decision was made” and thus part of the record, *IMS P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997), because the FEC claims they pre-decisional, FEC Opp. 13. But, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *CREW v. U.S. G.S.A.*, 358 F. Supp. 3d 50, 53 (D.D.C. 2019) (authors’ “significant decision-making authority” cuts against conclusion document is predecisional and privileged). Here, the FEC indisputably made four

decisions: first, to find reason to believe Freedom Vote likely violated the FECA, second, to deadlock on whether there was probable cause to believe Freedom Vote violated the FECA, third, to decline to exercise prosecutorial discretion, and fourth, to close the file on CREW's case. CREW seeks the rationale for each of those decisions: rationale reflected in the executive session discussions that were adopted through the prevailing vote.

The FEC contends that these discussions were not adopted because commissioners remain “free to change their minds.” FEC Opp. 15. Yet the FEC's explanation for its decisions is “limited to ‘the grounds the agency invoked when it took the action.’” *End Citizens United PAC*, 69 F.4th 916 at 921 (quoting *Regents*, 140 S. Ct. at 1907). A purpose behind the rule against post-hoc rationalization is to prevent the agency from changing its mind and supplying a different rationale for its action—a “convenient litigating position” for example. *Regents*, 140 S. Ct. at 1909. Once the FEC votes, commissioners are no longer free to change their minds on the grounds for that vote.

This rule is of particular significance for the FEC. To facilitate the “unusual statutory scheme” of judicial review of nonenforcement, courts have required the Commission to explain its enforcement decisions. *End Citizens United, PAC*, 90 F.4th at 1186, 1189 (Pillard, J., concurring). Where the Commission adopts the recommendation of the FEC's general counsel—which, notably, necessarily predates the decision to adopt them—courts review the explanation contained in the general counsel's analysis. *FEC v. Democratic Cong. Campaign Comm.*, 454 U.S. 27, 45 n. 19 (1981). Where they do not, however, the Commissioners must make public their own justification for departing from that analysis. *Democratic Cong. Campaign Comm. v. FEC*, 831 F.2d 1131, 1132 (D.C. Cir. 1987). And where only half the Commission departs from the recommendation, deadlocking the agency, and there is a subsequent dismissal through a

majority vote to close the file, courts have required the deadlocking commissioners publish their explanation. *FEC v. Nat'l Republican Sen. Comm.*, 966 F.2d 1471, 1476 (D.C. Cir. 1992); *see also Regents*, 140 S. Ct. at 1907 (agency may, after action, offer a fuller explanation, but is still limited to memorializing the agency's reasoning as it existed "at the time of the agency action"). What results—in tension with general administrative law, *see Local 814, Int'l Broth. Of Teamster v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)—is a situation where an explanation from fewer than the full set of decisionmakers—the majority that closed the file—is offered to explain the majority's action. That creates an opportunity for that minority to fabricate new "convenient litigating position[s]," *Regents*, 140 S. Ct. at 1909, that were not the motivation behind the majority's decision to close the file. Indeed, it's quite likely that occurred here as three commissioners claimed in a post-hoc rationalization that the majority closed the file in part due to prosecutorial discretion, *Statement of Reasons of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III*, at 7, MUR 7465 (Freedom Vote), Mar. 7, 2022, <https://perma.cc/7M7A-4UHJ>, notwithstanding the fact the decisive commissioner who voted to close the file explicitly voted against exercising prosecutorial discretion, Cert., MUR 7465 (Freedom Vote) Nov. 9, 2021, and in her own statement explaining the dismissal did not mention prosecutorial discretion at all, *Statement of Chair Shana M. Broussard and Commissioners Steven T. Walther and Ellen L. Weintraub*, MUR 7465 (Freedom Vote), Dec. 16, 2021, <https://bit.ly/3Ie0XRy>. Rather, the grounds for that vote, and the earlier actions the FEC took, are to be found, if at all, in its executive session records, which grounds the FEC is not thereafter "free to change." *Cf.* FEC Opp. 15.

Accordingly, the FEC's rationale for its decisions, if one exists at all, is limited to the grounds the Commission discussed and that won the day in the respective votes. Such discussion

was, by necessity, adopted as the FEC's position on the issues at the time of the votes and is not protected by the deliberative process privilege.

D. The FEC Fails to Establish Attorney-Client Privilege Precludes Production

The FEC finally asserts that “several topics that would be addressed” in the documents CREW seeks in its requests for production “invade the realm of protected information in the attorney-client relationship.” FEC Opp. 18. Notably, the FEC does not claim that all of the sought-after materials are subject to either attorney-client or work product privileges.

Accordingly, such privilege, even if it were timely and adequately asserted, would not preclude production of all responsive documents.

Nevertheless, the FEC's invocation is still inadequate. “[T]he party claiming the privilege bears the burden of proving that the communications are protected.” *In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998); *see also* Fed. R. Civ. P. 26(b)(5)(A)(ii) (party invoking privilege must “describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable parties to assess the claim”). As the invoking party, the FEC must “present the underlying facts demonstrating the existence of the privilege in order to meet its burden.” *Lindsey*, 158 F.3d at 1270 (internal quotation marks omitted). “A blanket assertion of the privilege will not suffice.” *Id.*

The FEC presents no such underlying facts. It produced no privilege log. It does not even assert responsive privileged documents exist and rather speaks only in generalities. *See* FEC Opp. 20. The FEC has completely failed to adequately assert any claim to attorney-client privilege (notwithstanding having more than a year to do so), never mind a privilege that would preclude production of every responsive record.

CONCLUSION

This matter has been pending for almost two years. More than six years have passed since CREW filed its initial complaint with the agency. The FEC's attempts to further delay resolution of this case and to withhold relevant materials should not be countenanced. The FEC's assertions of privilege are untimely and insufficient, and they cannot serve to cover up the agency's rationale for its actions.

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Respectfully submitted,

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